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No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1997

MRS. IDA GUTHMANN, deceased, STEPHEN F. GUTHMANN, ESQ., personally and as administrator as of 24 September 1992,

Petitioners,

against

CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK-NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P.A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA, DR. GEORGE E. MITCHELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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(3403 – 1997)

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QUESTIONS PRESENTED

Whether 42 U.S.C. §1395dd requires hospitals participating in the Medicare and Medicaid programs to provide proper medical care for those persons suffering medical emergencies by establishing and assuring an adequate airway and adequate ventilation to prevent suffocation and death.

Whether 29 U.S.C. §794 prohibits hospitals participating in the Medicare and Medicaid programs from withholding medical treatment and emergency medical treatment from an "otherwise qualified" but severely paralyzed individual.

Whether 42 U.S.C. §12101 prohibits hospitals available to the public from withholding medical treatment and emergency medical treatment from a disabled individual.

Whether Article 29-B of the Public Health Law (PHL) of the State of New York prohibits hospitals from withholding pulmonary resuscitation and ventilatory support in contravention of the order of the health care surrogate that pulmonary resuscitation and ventilatory support be provided.

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The New York State Court of Appeals has, in effect, decided questions of federal law - the three federal statutes herein cited - in a way that directly conflicts with the United States District Court for the Eastern District of Virginia and with the United States Court of Appeals for the Fourth Circuit; in that the New York State Court of Appeals has refused to enforce laws (including state law) requiring life saving treatment for hospital patients, while the federal courts have enforced those federal laws. Thus, the courts of the State of New York, involved in this matter, have so far departed from the accepted and usual course of judicial proceedings as to call for a grant of this petition. In the alternative, the Court may wish to consider summary reversal.

TABLE OF AUTHORITIES

Federal Cases:

Matter of Baby K, 832 F.Supp. 1022 (E.D.Va.1993), 16 F.3d 590 (4th Cir.1994)

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JURISDICTION

The order sought to be reviewed by the Supreme Court of the United States was issued by the New York State Court of Appeals on 17 June 1997, which order denied permission to appeal to that Court. A1 & A2.[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

Federal questions were raised in the petitioner's brief in the Appellate Division. They were argued by the respondents and replied to by the petitioner. Federal questions were again argued in the motion papers in the Court of Appeals. Federal questions were ignored by the Appellate Division and the Court of Appeals, as was Article 29-B of the Public Health Law of the State of New York.

Judicial notice shall be taken of federal law by New York State Courts (Rule 4511(a) of the Civil Practice Law and Rules). Although new facts may not be asserted for the first time on appeal, additional law may be asserted.

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[1] References to "A___" are to the appendix.

FOUR STATUTORY PROVISIONS INVOLVED

EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT, 42 USC §1395dd ("EMTALA")

EMTALA requires that hospitals participating in the Medicare and Medicaid programs provide stabilizing medical treatment to any person who comes to an emergency department in an "emergency medical condition" when treatment is requested on that person's behalf. An "emergency medical condition" is defined in the statute as

> acute symptoms of sufficient severity . . . such that the absence of immediate medical attention could reasonably be expected to result in . . . serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.

42 USC §1395dd(e)(1)(A).

"Stabilizing" medical treatment is defined as "such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition" will result. Id. §1395dd(e)(3)(A). The statute's legislative history includes a position paper by the American College of Emergency Physicians stating that "stabilization" should include "[e]stablishing and assuring an adequate airway and adequate ventilation." H.R.Rep. No.241 (Pt.3), 99th Cong., 1st Sess. 26 (1985).

REHABILITATION ACT OF 1973, §504, 29 U.S.C.§794

Section 504 of the Rehabilitation Act prohibits discrimination against an "otherwise qualified" handicapped individual, solely by reason of his or her handicap, under any program or activity receiving federal financial assistance. Hospitals such as defendant that accept Medicare and Medicaid funding are subject to the act.

AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. §12101 ("ADA")

Section 302 of the ADA prohibits discrimination against disabled individuals by "public accommodations." 42 U.S.C. §12182. A "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. §12102(2). This includes any physiological disorder or condition affecting the neurological system, musculoskeletal system, or sense organs, among others. 28 C.F.R. §36.104 (definition of "physical or mental impairment"). "Public accommodation" is defined to include a "professional office of a health care provider, hospital, or other service establishment." 42 U.S.C. §12181(7). The defendant hospital is a public accommodation under the ADA. 28 C.F.R. §36.104.

Section 302(a) of the ADA states a general rule of nondiscrimination against the disabled:

> General Rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

ARTICLE 29-B OF THE PUBLIC HEALTH LAW OF THE STATE OF NEW YORK ("PHL")

PHL §2965(1)(a) provides:

> The Consent of a surrogate . . . acting on behalf of an adult patient who lacks capacity . . . must be obtained prior to issuing an order not to resuscitate the patient . . . .

PHL §2965(2)(a)(iii) provides:

> One person from the following list, to be chosen in order of priority listed, when persons in the prior subparagraphs are not reasonably available, willing to make a decision regarding issuance of an order not to resuscitate, and competent to make a decision regarding issuance of an order not to resuscitate, shall have the authority to act as a surrogate on behalf of the patient: . . . a son or daughter eighteen years of age or older . . . .

STATEMENT

A. Facts in brief

While in the defendant hospital, the plaintiff developed an upper respiratory tract infection as evidenced by excessive sputum production and fever. In contravention to the order of the health care surrogate, a decision was made by the defendants to withhold effective treatment. As a result the patient developed pneumonia and choked to death on her secretions.

B. A More Detailed Statement of the Facts

The decedent, Mrs. Ida Guthmann, was abandoned while a patient in Crouse Irving Memorial Hospital by denying her the necessary treatment to sustain her life. The complained of events took place during the latter part of August 1991 through the date of death on 4 September 1991.

The decedent developed an upper respiratory tract infection with extra mucus production. She had difficulty clearing her mucus secretions and as a result her airways became progressively more obstructed. Excessive secretions were documented by the nurses.[2] The defendant hospital did

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[2] The factual underpinning for this statement and subsequent factual statements appears in the record. However, the rules of this Court do not permit actual reproduction of pages from the hospital chart.

some suctioning to help clear the airways, which was insufficient. The result of the increasing obstruction of the airways was to progressively impede gas exchange in the lungs. This is shown by the laboratory report of the arterial blood gases. Readings were taken on 27 August, and 2 and 3 September. That is, too little oxygen (0_2) could get to the alveolar membranes to diffuse into the blood and too little carbon dioxide ($C0_2$) could diffuse out of the blood through the alveolar membranes into the air. The laboratory report shows the normal ranges for pCO_2 (partial pressure of carbon dioxide) and pO_2 (partial pressure of oxygen) and the patient's readings. Abnormal blood gas readings are considered an emergency situation requiring immediate treatment. *Griffith v. Mt. Carmel Medical Center, 831 F.Supp. 1532 (D.Kan. 1993) at 1544, fn.12.*

That is, surprising as it may seem to non-medical personnel (including this writer), over the course of about two weeks, the patient was slowly choking on her own increasingly excessive secretions in the airways.

The medical examiner, Dr. Erik Mitchell, performed an autopsy on the afternoon of 4 September 1991. His opinion of the cause of death was respiratory failure brought on by pneumonia in the lungs. As stated in his deposition on 4 January 1994, the immediate cause of death was complications of a subdural hematoma. (The subdural hematoma was evacuated at the defendant hospital two years prior to the patient's death.) The "acute immediate terminal complicating factor" was pneumonia in the lungs. According to the medical examiner, the patient had no other "anatomic factor of an acute nature". That is, the patient had no incurable terminal illness. Apparently, the subdural hematoma caused some nerve damage which reduced the decedent's ability to clear her airways of excessive secretions, requiring the hospital to aid in that function.

Although no one questions that the decedent died <u>with</u> pneumonia, in the State Supreme Court action the defendants submitted experts' affidavits which disagreed with the medical examiner's opinion that the patient died <u>from</u> pneumonia. However, those experts offered no explanation for the cause of death.

The discharge summary dictated by the defendant Dr. Scott Gingold and signed by the defendant attending physician, Dr. Luciano M. Modesti, states:

> Over the next couple of days her respiratory status deteriorated and early in the morning of 9/4/91 she was found by the nurses without spontaneous respirations.

The proper treatment to prevent further deterioration of the patient's respiratory status was antibiotics to kill the organisms responsible for the respiratory infection and pulmonary toilet to clear the airways of excessive secretions. As the infection progressed, pulmonary toilet became the more urgent treatment because the excessive secretions were increasingly obstructing the airways. It was a substandard deviation from accepted standards of medical care to withhold effective airway clearing treatment and to withhold medicine to kill the infectious organisms, as stated by the plaintiffs' expert in two affidavits.

On or about 27 August the patient was diagnosed as having pulmonary emboli; and as a result was treated with blood thinners until her death. However, the patient had no pulmonary emboli, as evidenced by the autopsy protocol of 11 September 1991:

> The pulmonary vessels from the level of the pulmonary trunk to the tertiary bifurcations show no clots or thrombi and multiple section of the lung demonstrates no clot in any vessel.

However, even if the diagnosis of pulmonary emboli could be justified, such a diagnosis would not justify withholding airway clearing treatment.

The defendant attending physician, Dr. Modesti, writing in the hospital chart, explicitly refused to save the patient's life.

> Her son wishes for -- her [sic his] mother to be given everything to save her life, including DNR

[sic CPR] - I strongly disagree with his request.

The defendant Dr. Turchik agreed, writing: "agree with Dr. Modesti's assessment. would not intubate". The defendant Dr. Battaglia also agreed, writing: "Agree with Dr. Modesti regarding intubation as I do not think it will change her long term outlook."

On the 2nd and 3rd of September 1991, the neurosurgery residents, defendant Dr. Gelnar and defendant Dr. Gingold, examined the patient and neither one ordered life saving pulmonary toilet nor respiratory intubation.

The final act of the defendants - CPR (cardiopulmonary resuscitation) - was neither timely nor properly performed. At approximately 12:00 AM on 4 September 1991 the patient began going into shock, meaning excessively low blood pressure; and nothing effective was done to help the patient. When the hospital finally did initiate CPR, it did so inadequately. Because, CPR consisted of only "CR" and not "PR". That is, no pulmonary resuscitation was attempted as shown by the Resuscitation Record, even though the patient was "found ... without spontaneous respirations".

In addition to common law abandonment, the events constitute a violation of Art. 29-B of the New York Public Health Law, because Art. 29-B prohibits the withholding of treatment without the permission of the patient or the patient's health care surrogate. As stated by the defendant, Dr. Modesti, in his 3 September note, permission to withhold treatment was refused by the patient's health care surrogate.

The defendants alleged that the decedent was in a persistent vegetative state - meaning permanently unconscious - apparently as a justification to deny treatment, or to persuade the patient's health care surrogate to grant the defendants permission to withhold treatment. However, the patient was responsive in the presence of the health care surrogate. Also, in an affidavit that is part of the record, Ms. Linda D. Chew stated that the patient was responsive in her presence on numerous occasions.

PROCEEDINGS BELOW

In the Appellate Division a motion for permission to appeal to the Court of Appeals was denied (A3).

The decisions of the Appellate Division of 30 December 1996, numbered 2131, 2132, 2133, 2134 & 2135 and the corresponding orders are reproduced in the appendix (A4 - A10).

In the Supreme Court three defendants moved for summary judgment. The plaintiffs then cross-moved for partial summary judgment on the liability portion of the cause of action in abandonment. Then the rest of the defendants cross moved for summary judgment. All the defendants' motions were granted and the plaintiffs' motion was denied. Those motions ended in an order entered on 16 November 1995 (A11 - A13) and a judgment entered on 16 November 1995 (A14). The plaintiff then filed a Notice of Appeal entered ll December 1995 (A15) with the Onondaga County Clerk, taking an appeal from both the aforesaid order and judgment. The Appellate Division order #2131 corresponds to the 16 November 1996 order and #2132 corresponds to the 16 November 1996 judgment.

The plaintiffs then moved to renew the 16 November 1996 order and the 16 November 1996 judgment, which motion was also denied. The renewal motion ended in an order entered 4 April 1996 (A16 - A17), a judgment entered 11 April 1996 (A18) and another judgment entered 25 April 1996 (A19 - A20). The plaintiffs then filed another Notice of Appeal entered 30 April 1996 (A21) with the Onondaga County Clerk, taking an appeal from the 4 April 1996 order, the 11 April 1996 judgment and the 25 April 1996 judgment. The Appellate Division order #2133 corresponds to the 4 April 1996 order, #2134 corresponds to the 11 April 1996 judgment and #2135 corresponds to the 25 April 1996 judgment.

A word-for-word duplicate of the 11 April 1996 judgment was entered on 3 May 1996 (A22), from which no appeal was taken because no appeal lies from a duplicate judgment. *Kabelac v Harding, 127 AD2d 1011 (4th Dep't 1987)* (A23). Two of the judges - Judge Pine and Judge Balio - who concurred in the *Kabelac* decision also concurred in the decisions herein.

The aforementioned 2 orders and 4 judgments entered for the Supreme Court motions are the only orders and judgments entered for the Supreme Court motions.

That is, the two Notices of Appeal by the plaintiffs specifically indicated that the plaintiffs were appealing from the order entered on 16 November 1995, the judgment entered on 16 November 1995, the order entered on 4 April 1996, a judgment entered on 11 April 1996 and a judgment entered on 25 April 1996 - the only orders and judgments from which appeals could possibly lie. The orders of the Appellate Division entered on 30 December 1996, numbered 2131 through 2135, separately dispose of each order and judgment the plaintiffs referred to in their notices of appeal.

By its reference to *Hughes v Nussbaumer, Clarke & Velzy, 140 AD2d 988 (4th Dep't 1988)* (A23) the Appellate Division suggested that the plaintiffs did not appeal from a judgment which should have been appealed from. However, the *Hughes* reference introduces a suggestion of a procedural error by the plaintiffs which is contrary to the facts of the plaintiffs' appeal to the Appellate Division because an appeal was taken from every appealable judgment of the Supreme Court.

By its reference to *Matter of Eric D. (appeal No.l, 162 AD2d 1051 (4th Dep't 1990)* (A24) the Appellate Division suggested that the plaintiffs did not appeal from an amended order which should have been appealed from. However, the *Matter of Eric D.* reference introduces a suggestion of a procedural error by the plaintiffs which is contrary to the facts of the plaintiffs' appeal to the Appellate Division because an appeal was taken from every order of the Supreme Court. Furthermore, no amended order exists in this matter.

For the foregoing reasons the Appellate Division should have adjudicated this case on its merits, rather than dismissing the case based on the suggestion of a procedural error on the part of the plaintiffs-appellants which does not exist.

REASONS FOR GRANTING THE PETITION

The constitutionality of New York State's law against assisted suicide (Penal Law §125.15) was upheld by this Court during the 1996 October Term *(Vacco v Quill)*. One reason in support of the prohibition was that doctor-assisted suicide would lead to murder by doctors, of which this case is a prime example. The treatment of the elderly and infirm in the hospitals of the State of New York is of public importance and worthy of this Court's time and attention.

If this Court does not act, a substantial injustice will be done, not only to the decedent, but also to other elderly and infirm hospital patients. Because, they would have no protection from doctors and hospitals who might veto with impunity their decision for treatment, even though they have a right to treatment. As matters now stand, the aged and infirm are not safe in the hospitals of the State of New York.

Respectfully submitted,

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State of New York,
Court of Appeals

At a session of the Court, held at Court of
Appeals Hall in the City of Albany
on the seventeenth day
of June 1997

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

4-10 11 Mo. No. 510
Stephen F. Guthmann, Esq., &c.
Of Estate of Ida Guthmann,
Deceased,

Appellant,

v.

Crouse Irving Memorial Hospital,
et al.,

Respondents.

(Appeal No. 1)

(And four other actions.)

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the Appellate Division order that affirmed Supreme Court's order denying appellant's motion to renew, be and the same hereby is dismissed upon the ground that that order sought to be appealed from does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York
12207-1095

DECISION June 17, 1997

4-10 11 Mo. No. 510
Stephen F. Guthmann, Esq., &c.
of Estate of Ida Guthmann,
Deceased,

Appellant,

v.

Crouse Irving Memorial Hospital,
et al.,

Respondents.

(Appeal No. 1)

(And four other actions.)

Motion, insofar as it seeks leave to appeal from the Appellate Division order that affirmed Supreme Court's order denying appellant's motion to renew, dismissed upon the ground that that order sought to be appealed from does not finally determine the action within the meaning of the Constitution; motion for leave to appeal otherwise denied.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NOS. 2131-2135/96

PRESENT: PINE, J. P., LAWTON, DOERR, BALIO AND FALLON, JJ.

STEPHEN F. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED,

APPELLANT,

V

CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P.A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL,

RESPONDENTS.

Appellant having moved for leave to appeal to the Court of Appeals from or, in the alternative, reargument of the orders of this Court entered December 30, 1996,

Now, upon reading and filing the affidavit of Stephen F. Guthmann sworn to January 16, 1997, the notice of motion with proof of service thereof, the opposing affidavit of Nancy L. Pontius sworn to January 22, 1997, the opposing affidavit of David R. Klotz sworn to January 24, 1997, the opposing affidavit of Daniel A. Bronk sworn to January 29, 1997, the reply affidavit of Stephen F. Guthmann sworn to January 29, 1997, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied.

Entered: March 14, 1997 CARL M. DARNALL, Clerk

2131. (Onondaga Co.) -- STEPHEN P. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED, APPELLANT, V CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL, RESPONDENTS. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (see, Hughes v Nussbaumer, Clarke & Velzy, 140 AD2d 988; see also, CPLR 5501 [a] [1]). (Appeal from Order of Supreme Court, Onondaga County, Hayes, J. - Summary Judgment.) PRESENT: PINE, J. P., FALLON, DOERR AND BALIO, JJ (Filed Dec. 30, 1996)

2132. (Onondaga Co.) -- STEPHEN P. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED, APPELLANT, V CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL, RESPONDENTS. (APPEAL NO. 2.) -- Appeal unanimously dismissed without costs (see, Matter of Eric D. [appeal No. 1], 162 AD2d 1051) (Appeal from Judgment of Supreme Court, Onondaga County, Hayes, J. Dismiss Action.) PRESENT: PINE, J P., FALLON, DOERR AND BALIO, JJ. (Filed Dec. 30, 1996.)

2133 . (Onondaga Co.) -- STEPHEN P. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED, APPELLANT, V CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO

M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL, RESPONDENTS. (APPEAL NO. 3.) -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Onondaga County, Hayes, J. - Renewal.) PRESENT: PINE, J P., FALLON, DOERR AND BALIO, JJ. (Filed Dec. 30, 1996.)

2134. (Onondaga Co.) -- STEPHEN P. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED, APPELLANT, V CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEOROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL, RESPONDENTS. (APPEAL NO. 4.) -- Appeal unanimously dismissed without costs *(see, Matter of Eri c D.* [appeal No. 1], 162 AD2d 1051) (Appeal from Judgment of Supreme Court, Onondaga County, Hayes, J. - Dismiss Action.) PRESENT: PINE, J P., FALLON, DOERR AND BALIO, JJ. (Filed Dec. 30, 1996.J

2135. (Onondaga Co.) -- STEPHEN P. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED, APPELLANT, V CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL, RESPONDENTS. (APPEAL NO. 5.) - - Judgment unanimously affirmed without costs. (Appeal from Judgment of Supreme Court, Onondaga County, Hayes, J. Dismiss Action.) PRESENT: PINE, J. P., FALLON, DOERR AND BALIO, JJ. (Filed Dec. 30, 1996.)

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

2131

PRESENT: PINE, J. P., FALLON, DOERR AND BALIO, JJ.

STEPHEN F. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED,
APPELLANT,
V
CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL, RESPONDENTS. (APPEAL NO. 1.)

Stephen F. Guthmann, Esq., personally and as administrator as of September 24, 1992, of estate of Ida Guthmann, deceased, having appealed to this Court from the order of the Supreme Court, entered in the Onondaga County Clerk's office on November 16, 1995, and said appeal having been submitted by Stephen F. Guthmann, appellant, argued by Nancy Pontius of counsel for respondents Crouse Irving Memorial Hospital, Esther Murrock, Nurse Practitioner, Dr. Scott Gingold and Dr. P. A. Gelnar, Daniel Bronk of counsel for respondents Dr. Luciano M. Modesti and Neurological Surgery Group of Physicians, David Klotz of counsel for respondents Dr. James B. Turchik, Dr. Joseph G. Battaglia and Dr. George E. Mitchell, and due deliberation having been had thereon,

It is hereby ORDERED that said appeal be and the same hereby is unanimously dismissed without costs (see, Hughes v Nussbaumer, Clarke & Velzy, 140 AD2d 988; see also, CPLR 5501 [a] [1]).

Entered: December 30, 1996 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

2132

PRESENT: PINE, J. P., FALLON, DOERR AND BALIO, JJ.

STEPHEN F. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED,
APPELLANT,
V
CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL, RESPONDENTS. (APPEAL NO. 2.)

Stephen F. Guthmann, Esq., personally and as administrator as of September 24, 1992, of estate of Ida Guthmann, deceased, having appealed to this Court from the Judgment of the Supreme Court, entered in the Onondaga County Clerk's office on November 16, 1995, and said appeal having been submitted by Stephen F. Guthmann, appellant, argued by Nancy Pontius of counsel for respondents Crouse Irving Memorial Hospital, Esther Murrock, Nurse Practitioner, Dr. Scott Gingold and Dr. P. A. Gelnar, Daniel Bronk of counsel for respondents Dr. Luciano M. Modesti and Neurological Surgery Group of Physicians, David Klotz of counsel for respondents Dr. James B. Turchik, Dr. Joseph G. Battaglia and Dr. George E. Mitchell, and due deliberation having been had thereon,

It is hereby ORDERED that said appeal be and the same hereby is unanimously dismissed without costs (*see, Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: December 30, 1996 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

2133

PRESENT: PINE, J. P., FALLON, DOERR AND BALIO, JJ.

STEPHEN F. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED,
APPELLANT,
V
CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL,
RESPONDENTS. (APPEAL NO. 3.)

Stephen F. Guthmann, Esq., personally and as administrator as of September 24, 1992, of estate of Ida Guthmann, deceased, having appealed to this Court from the order of the Supreme Court, entered in the Onondaga County Clerk's office on April 4, 1996, and said appeal having been submitted by Stephen F. Guthmann, appellant, argued by Nancy Pontius of counsel for respondents Crouse Irving Memorial Hospital, Esther Murrock, Nurse Practitioner, Dr. Scott Gingold and Dr. P. A. Gelnar, Daniel Bronk of counsel for respondents Dr. Luciano M. Modesti and Neurological Surgery Group of Physicians, David Klotz of counsel for respondents Dr. James B. Turchik, Dr. Joseph G. Battaglia and Dr. George E. Mitchell, and due deliberation having been had thereon,

It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously affirmed without costs.

Entered: December 30, 1996 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

2134

PRESENT: PINE, J. P., FALLON, DOERR AND BALIO, JJ.

STEPHEN F. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED,
APPELLANT,
V
CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL,
RESPONDENTS. (APPEAL NO. 4.)

Stephen F. Guthmann, Esq., personally and as administrator as of September 24, 1992, of estate of Ida Guthmann, deceased, having appealed to this Court from the judgment of the Supreme Court, entered in the Onondaga County Clerk's office on April 11, 1996, and said appeal having been submitted by Stephen F. Guthmann, appellant, argued by Nancy Pontius of counsel for respondents Crouse Irving Memorial Hospital, Esther Murrock, Nurse Practitioner, Dr. Scott Gingold and Dr. P. A. Gelnar, Daniel Bronk of counsel for respondents Dr. Luciano M. Modesti and Neurological Surgery Group of Physicians, David Klotz of counsel for respondents Dr. James B. Turchik, Dr. Joseph G. Battaglia and Dr. George E. Mitchell, and due deliberation having been had thereon,

It is hereby ORDERED that said appeal be and the same hereby is unanimously dismissed without costs (*see, Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: December 30, 1996 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

2135

PRESENT: PINE, J. P., FALLON, DOERR AND BALIO, JJ.

STEPHEN F. GUTHMANN, ESQ., PERSONALLY AND AS ADMINISTRATOR AS OF SEPTEMBER 24, 1992, OF ESTATE OF IDA GUTHMANN, DECEASED,
APPELLANT,
V
CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK, NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P. A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA AND DR. GEORGE E. MITCHELL,
RESPONDENTS. (APPEAL NO. 5.)

Stephen F. Guthmann, Esq., personally and as administrator as of September 24, 1992, of estate of Ida Guthmann, deceased, having appealed to this Court from the judgment of the Supreme Court, entered in the Onondaga County Clerk's office on April 25, 1996, and said appeal having been submitted by Stephen F. Guthmann, appellant, argued by Nancy Pontius of counsel for respondents Crouse Irving Memorial Hospital, Esther Murrock, Nurse Practitioner, Dr. Scott Gingold and Dr. P. A. Gelnar, Daniel Bronk of counsel for respondents Dr. Luciano M. Modesti and Neurological Surgery Group of Physicians, David Klotz of counsel for respondents Dr. James B. Turchik, Dr. Joseph G. Battaglia and Dr. George E. Mitchell, and due deliberation having been had thereon,

It is hereby ORDERED that the Judgment so appealed from be and the same hereby is unanimously affirmed without costs.

Entered: December 30, 1996 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

MRS. IDA GUTHMANN, Deceased
STEPHEN F. GUTHMANN, ESQ.,
Personally and as Administrator as
of 24 Sep 92,

Plaintiff,

vs.

CROUSE IRVING MEMORIAL
HOSPITAL, ESTHER MURROCK-
Nurse Practitioner, DR. SCOTT
GINGOLD, DR. P.A. GELNAR,
DR. LUCIANO M. MODESTI,
NEUROLOGICAL SURGERY
GROUP OF PHYSICIANS,
DR. JAMES B. TURCHIK, DR.
JOSEPH G. BATTAGLIA, DR.
GEORGE E. MITCHELL,

Defendants.

ORDER

Index No.
92-5313

Entered
16 Nov 95

Defendants having moved this court for summary judgment on all causes of action and the Plaintiff having cross-moved for partial summary judgment on the cause of action in abandonment, and the court having received and reviewed the following:

1. Defendants Turchik, Battaglia, and Mitchell Notice of Motion dated June 27, 1995;
2. The affidavit of David R. Klotz, Esq. sworn to on June 27, 1995, along with the accompanying exhibits;
3. The affidavit of Mitchell Brody, M.D., sworn to on April 28, 1995;
4. The affidavit of James L. Potts, M.D., sworn to on June 20, 1994;
5. The affidavit of Alan Foster, M.D., sworn to on May 4,

1995;
6. Defendants Crouse Irving Memorial Hospital, EstherMurrock, Scott Gingold, M.D., and P.A. Gelnar, M.D.Notice of Motion dated September 21, 1995;
7. The affidavit of Catherine A. Gale, Esq., sworn to on September 2l, 1995, along with the accompanying exhibits;
8. The affidavit of _____M. D ., sworn to on September 21, 1995;
9. The affidavit of _____N.P., sworn to on September 21, 1995;
10. Plaintiff's "Notice of Cross Motion" dated September 5, 1995;
11. The affidavit of Stephen F. Guthmann, Esq. sworn to on September 5, 1995, along with the accompanying exhibits;
12. The affidavit of Linda Chew, sworn to on August 3, 1995;
13. Defendants Luciano M. Modesti, M.D. and Neurological Group of Physicians Notice of Motion dated September 27, 1995;
14. The affidavit of Daniel A. Bronk, Esq., sworn to on September 28, 1995, along with the attached exhibits;
15. The affidavit of David G. Storrs, M.D., sworn to on September 27, 1995; and
16. The affidavit of David R. Klotz, Esq., sworn to on October 5, 1995 without accompanying exhibits.
17. The affidavit of Stephen F. Guthmann, Esq. sworn to on October 24, 1995, along with the accompanying exhibits.

The court having heard oral argument on October 27, 1995 from: Stephen F. Guthmann on behalf of the plaintiff; Nancy Pontius, Esq. on behalf of defendants Crouse Irving Memorial Hospital, Esther Murrock, Scott Gingold, M.D., P.A. Gelnar, M.D.; David R. Klotz, Esq. on behalf of defendants James B. Turchik, M.D., Joseph G. Battaglia, M.D., George E. Mitchell, M.D.; and Daniel A. Bronk, Esq. on behalf of defendants Luciano M. Modesti, M.D. and Neurological Group of Physicians.

IT IS HEREBY ORDERED that the defendants motions for summary judgment are granted in their entirety dismissing the plaintiff's causes of action with prejudice, and itis hereby further,

ORDERED that the plaintiff's cross motion for partial summary judgment is denied with prejudice.

Dated: Nov. 15, 1995

ENTER

/s/ Leo F. Hayes
Justice Leo F. Hayes

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

MRS. IDA GUTHMANN, Deceased
STEPHEN F. GUTHMANN, ESQ.,
Personally and as Administrator as
of 24 Sep 92,

Plaintiff,

vs.

CROUSE IRVING MEMORIAL
HOSPITAL, ESTHER MURROCK-
Nurse Practitioner, DR. SCOTT
GINGOLD, DR. P.A. GELNAR,
DR. LUCIANO M. MODESTI,
NEUROLOGICAL SURGERY
GROUP.OF PHYSICIANS,
DR. JAMES B. TURCHIK, DR.
JOSEPH G. BATTAGLIA, DR.
GEORGE E. MITCHELL,

Defendants.

JUDGMENT
Index No.
92-5313

The Honorable Leo F. Hayes, having granted the defendant's, in this matter for summary judgment with prejudice and having dismissed all causes of action in this matter, by Order dated November 15, 1995 it is hereby

ORDERED, ADJUDGED and DECREED that this matter is dismissed with prejudice.

Judgment signed this 16 day of Nov, 1995.

/s/ Deputy County Clerk
Clerk of the Supreme Court

ENTERED:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

Index #92-5313
10 Aug 92
RJI #93-0800

Mrs.Ida Guthmann, deceased, Stephen F. Guthmann, Esq., personally and as administrator as of 24 Sep 1992,
Plaintiffs

vs

NOTICE OF APPEAL

Crouse Irving Memorial Hospital
Esther Murrock- nurse practioner
Dr. Scott Gingold, Dr. P.A.Gelnar,
Dr. Luciano M. Modesti, Neurological Surgery Group of Physicians, Dr. James B. Turchik, Dr. Joseph G. Battaglia, Dr. George B. Mitchell,
Defendants

SIRS:
PLEASE TAKE NOTICE that the plaintiffs hereby appeal to the Appellate Division of the Supreme Court, Fourth Department, from a judgment entered 16 November 1995 and from an order entered 16 November I995 in this action, in the office of the Clerk of the County of Onondaga, and from each and every part of said judgment and order.

11 December 1995

Stephen F. Guthmann, Esq.
1 Brandon Road
DeWitt, New York 13214
315- 446-0484

TO:
Onondaga County Clerk

Smith, Sovik, Kendrick & Sugnet

Mackenzie Smith Lewis Michell & Hughes

Martin, Ganotis, Brown, Mould & Currie

At a Motion Term of the Supreme Court held in and for the County of Onondaga at the Courthouse in the City of Syracuse, New York on the 15th day of March, 1996.

PRESENT: HONORABLE Leo F. Hayes

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

MRS. IDA GUTHMANN, Deceased
STEPHEN F. GUTHMANN, ESQ.,
Personally and as Administrator as of
24 Sep 92,

Plaintiff,

ORDER

Index No.
92-5313

vs .

CROUSE IRVING MEMORIAL HOSPITAL,
ESTHER MURROCK- Nurse Practitioner,
DR. SCOTT GINGOLD, DR. P.A. GELNAR,
DR. LUCIANO M. MODESTI,
NEUROLOGICAL SURGERY GROUP OF
PHYSICIANS, DR. JAMES B. TURCHIK,
DR. JOSEPH G. BATTAGLIA,
DR. GEORGE E. MITCHELL,

Entered 4 Apr 96

Defendants.

Plaintiff having moved this court for renewal of the motion dated December 28, 1995 and the order and judgment thereupon entered on November 16, 1995 and the court having received and reviewed the following:

1. All of the documents listed in the prior Order of the Court dated November 15, 1995;

2. Plaintiff's Notice of Motion to Renew dated December 28, 1995;

3. The Affidavit of Stephen F. Guthmann, Esq. sworn

to on December 28, 1995 along with the accompanying exhibits;

4. The Affidavit of plaintiff's physician, dated December 22, 1995;

5. The letter of Catherine Gale to Judge Hayes dated February 7, 1996;

6. The Affidavit of David R. Klotz, Esq., sworn to on January 11, 1996 and a memorandum of law;

7. The Affidavit of Daniel A. Bronk, Esq., sworn to on January 12, 1996 along with the accompanying exhibits and a memorandum of law;

8. The Affidavit of Nancy Light, R.N., sworn to on January 12, 1996;

9. The Affidavit of Catherine Gale, Esq., sworn to on January 12, 1996 and a memorandum of law;

10. Stephen F. Guthmann's Reply Affidavit, sworn to on January 29, 1996;

11. The Reply Affidavit of Daniel A. Bronk, Esq. sworn to on February 26, 1996;

12. The Supplemental Affidavit of the plaintiff's physician, sworn to on March 5, 1996 along with the accompanying exhibits;

13. The Reply Affidavit of Charles E. Patton, Esq., sworn to on March 13, 1996; and

14. The Reply Affidavit of Nancy L. Pontius, Esq., sworn to on March 11, 1996.

The court having heard oral argument on March 15, 1996 from: Stephen F. Guthmann on behalf of the plaintiff; Catherine Gale, Esq. on behalf of defendants Crouse Irving Memorial Hospital, Esther Murrock, Scott Gingold, M.D., P.A. Gelnar, M.D.; Charles E. Patton, Esq. on behalf of defendants James B. Turchik, M.D., Joseph G. Battaglia, M.D., George E. Mitchell, M.D;; and Daniel A. Bronk, Esq. on behalf of defendants Luciano M. Modesti, M.D. and Neurological Group of Physicians, it is hereby

ORDERED that the plaintiff's motion for renewal is denied in its entirety.

Dated:4/01/96

ENTER

/s/ Leo F. Hayes
Justice Leo F. Hayes

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

MRS. IDA GUTHMANN, Deceased
STEPHEN F. GUTHMANN, ESQ.,
Personally and as Administrator as of
24 Sep 92,

Plaintiff,

JUDGMENT
Index No.
92-5313

CROUSE IRVING MEMORIAL
HOSPITAL, ESTHER MURROCK-
Nurse Practitioner, DR. SCOTT
GINGOLD, DR. P.A. GELNAR,
DR. LUCIANO M. MODESTI,
NEUROLOGICAL SURGERY
GROUP OF PHYSICIANS,
DR. JAMES B. TURCHIK,
DR. JOSEPH G. BATTAGLIA,
DR. GEORGE E. MITCHELL,

Defendants.

The Honorable Leo F. Hayes, having denied the plaintiff's motion for renewal, and having dismissed all causes of action in this matter, by Order dated April 1, 1996, which was filed on April 4, 1996, it is hereby

~~ORDERED~~, ADJUDGED and DECREED that this matter is dismissed with prejudice.

Judgment signed this 11 day of April , 1996.

SHARON R. RENK
DEPUTY COUNTY CLERK
Clerk of the Supreme Court

ENTERED:

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

MRS. IDA GUTHMANN, Deceased
STEPHEN F. GUTHMANN, ESQ., Personally
and as Administrator as of 24, September, 1992,
Plaintiff,

JUDGMENT

–vs–

Index No:
92-5313

CROUSE-IRVING MEMORIAL
HOSPITAL, ESTHER MURROCK,
Nurse Practitioner, DR. LUCIANO M.
MODESTI,NEUROLOGICAL SURGERY
GROUP OF PHYSICIANS, DR. JAMES B.
TURCHIK, DR. JOSEPH G. BATTAGLIA,
DR. SCOTT GINGOLD, DR. P.A. GELNAR,
DR. GEORGE E. MITCHELL,

Defendants.

A motion having been made by plaintiff, at a Special Term of this Court held at the Onondaga County Court House in Syracuse, New York on the 15th day of March, 1996 for renewal of the summary judgment motions and the Order and Judgment thereupon entered on November 16, 1995, and said motion having been denied, and an Order having been duly made by Honorable Leo F. Hayes dismissing the Complaint herein with prejudice, and said Order having been entered in the office of the Clerk of this Court on the 4th day of April, 1996, and the costs and disbursements having been duly taxed at THREE HUNDRED SEVENTY-FOUR AND 10/100 DOLLARS, ($374.10),

NOW, on motion of Mackenzie Smith Lewis Michell & Hughes, Catherine A. Gale, Esq., of counsel, attorneys for defendants Crouse-Irving Memorial Hospital, Esther Murrock, Dr. Scott Gingold and Dr. P.A. Gelnar, it is

ADJUDGED, that the Complaint in this action be. and the same hereby is dismissed with prejudice, and it is further

ADJUDGED, that defendants Crouse-Irving Memorial Hospital, Esther Murrock, Dr. Scott Gingold and Dr. P.A. Gelnar of 736 Irving Avenue, Syracuse, New York recover of the plaintiff, Mrs. Ida Guthmann, deceased, Stephen F. Guthmann, Esq., personally and as Administrator as of 24, September, 1992, of 1 Brandon Road, Dewitt, New York the amount of THREE HUNDRED SEVENTY-FOUR AND 10/100 DOLLARS (S374.10) costs and disbursements as taxed and have execution therefor.

DATED: April 24, 1996

JUDGMENT ENTERED AND S'GNED THIS 25 DAY OF APRIL, 1996.

SHARON R. RENK
DEPUTY COUNTY CLERK
Deputy County Clerk

Also attached is a Bill of Costs:

Costs before note of issue CPLR §8201(1):	$200
Disbursements, stenographer's fee:	174.10
Total Costs and Disbursements	$374.10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

Index #92-5313
10 Aug 92
RJI #93-0800

Mrs.Ida Guthmann, deceased, Stephen F. Guthmann, Esq., personally and as administrator as of 24 Sep 1992,
Plaintiffs

vs

NOTICE
OF APPEAL

Crouse Irving Memorial Hospital
Esther Murrock- nurse practioner
Dr. Scott Gingold, Dr. P.A.Gelnar,
Dr. Luciano M. Modesti, Neurological Surgery Group of Physicians, Dr. James B. Turchik, Dr. Joseph G. Battaglia, Dr. George B. Mitchell,
Defendants

SIRS:

PLEASE TAKE NOTICE that the plaintiffs hereby appeal to the Appellate Division of the Supreme Court, Fourth Department, from an order entered on the 4th day of April 1996, a judgment entered on the 11th day of April 1996, and another judgment entered on the 25th day of April 1996, all in this action, and all in the Office of the Clerk of the County of Onondaga, and from each and every part of said order and Judgments.
30 April 1996.

Yours etc.,
Stephen F. Guthmann, Esq.
1 Brandon Road
DeWitt, New York 13214
315- 446-0484

To:
Onondaga County Clerk

Smith, Sovik, Kendrick & Sugnet
Mackenzie Smith Lewis Michell & Hughes
Martin, Ganotis, Brown, Mould & Currie

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

MRS. IDA GUTHMANN, Deceased
STEPHEN F. GUTHMANN, ESQ., Personally
and as Administrator as of 24 Sep 92,

Plaintiff

-vs-

JUDGMENT
Index No. 92-5313

CROUSE-IRVING MEMORIAL
HOSPITAL,ESTHER MURROCK,
Nurse Practitioner,DR. SCOTT
GINGOLD, DR. P.A. GELNAR,
DR. LUCIANO M. MODESTI,
NEUROLOGICAL SURGERY
GROUP OF PHYSICIANS, DR.
JAMES B. TURCHIK, DR.
JOSEPH G. BATTAGLIA, DR.
GEORGE E. MITCHELL,
Defendants

The Honorable Leo F. Hayes having denied the plaintiff's motion for renewal, and having dismissed all causes of action ln this matter, by Order dated April 1, 1996, which was filed on April 4, 1996, it is hereby

ADJUDGED and DECREED that this matter is dismissed with prejudice.

Judgment signed this
3rd day of May, 1996.

WILLIAM PIENKOWSKI
DEPUTY COUNTY CLERK
Clerk

ENTERED:

127 AD2d 1011 (4th Dep't 1987)

77 KURT KABELAC, Appellant, v WILLIAM HARDING, Respondent.—Motion for reargument granted and, upon reargument, motion to dismiss appeal granted. Memorandum: We dismissed the appeal from the judgment entered by plaintiff on July 15, 1986 because that judgment was duplicative of the judgment (denominated order) signed by the Trial Justice on April 24, 1986. The appeal properly lies from the April 24 judgment. Plaintiff contends that an appeal from the April 24 judgment would not be untimely because no notice of entry of that judgment has been served. That issue is not before us, however, for no appeal has been taken from the judgment of April 24. Present–Dillon, P. J., Green, Pine, Balio and Davis, JJ.

140 AD2d 988 (4th Dep't 1988)

71 WILLIAM HUGHES et al., Appellants, v. NUSSBAUMER, CLARKE & VELZY et al., Defendants, and NUSSBAUMER & CLARKE, INC., Respondent. (And A Third-Party Action.) (Appeal No. 1.)--Judgment unanimously reversed on the law with costs and motion denied. Memorandum: A judgment was entered after the entry of the order from which this appeal was taken. Where a prior order is subsumed within a judgment, the appeal is from the judgment, not the prior order (*Chase Manhattan Bank v Roberts & Roberts*, 63 AD2d 566). Nevertheless, absent prejudice to the respondent, this court has the discretionary power to treat the notice of appeal as one taken from the judgment, and we conclude that our discretion should be exercised in this case (CPLR 5520 [c]; *Frankel v Manufacturers Hanover Trust Co.*, 106 AD2d 542; *Chase Manhattan Bank v Roberts & Roberts, supra).*

162 AD2d 1051 (4th Dep't 1990)

150 In the Matter of ERIC D., an Infant. (Appeal No. 1.)--Appeal unanimously dismissed without costs. Memorandum: No appeal lies from an original order that has been superceded by an amended order (10 Carmody-Wait 2d, NY Prac § 70:28; *Gorfinkel v First Natl. Bank*, 19 AD2d 903, 904, *affd* 15 NY2d 711; *Kurtis v Allstate Ins. Co.*, 43 AD2d 954, 955; *Centino v Isbrandtsen Co.*, 13 AD2d 977, *revd on other grounds* 11 NY2d 690, *cert denied sub nom. Universal Term. & Stevedoring Corp. v Isbrandtsen Co.*, 370 US 912).
(Appeal from order of Niagara County Family Court, Halpin, J.–surrender of guardianship and custody.)
Present–Denman, J. P.,Boomer, Pine, Balio and Davis, JJ.

(2)

Supreme Court
FILED
SEP 10 1997
CLERK

No. 97-313

In The

Supreme Court of the United States

October Term, 1997

MRS. IDA GUTHMANN, deceased, STEPHEN F. GUTHMANN, ESQ., personally and as administrator as of 24 September 1992,

Petitioners,

against

CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK-NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P.A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA, DR. GEORGE E. MITCHELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

Kevin M. Reilly, Esq.
Counsel of Record
MACKENZIE SMITH LEWIS MICHELL & HUGHES, LLP
Attorneys for Respondents, Crouse Irving Memorial Hospital, Esther Murrock, Dr. Scott Gingold, and Dr. P.A. Gelnar
P.O. Box 4967
600 OnBank Building
Syracuse, NY 13221-4967

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STATEMENT OF THE CASE

The New York Court of Appeals dismissed that part of the petitioner's his motion that sought leave to appeal to that Court from the New York State Supreme Court, Appellate Division, Fourth Department order affirming the New York State Supreme Court's order denying his motion to renew summary judgment motions in which the respondents had been successful in obtaining dismissal of his complaint in this medical malpractice action. The Court of Appeals then denied that part of petitioner's motion for leave to appeal from the Appellate Division's affirmance of the dismissal of the complaint. Although petitioner appears to be seeking review by this Court solely of that part of the Court of Appeals' order denying him leave to appeal from the dismissal of his complaint, inasmuch as it is not clear, affirmance of the denial of his motion to renew is also discussed herein.

A. Relevant Facts Omitted by the Petitioner

Ida Guthmann, an 81 year old woman, was brought to the Crouse Irving Memorial Hospital ("Crouse") emergency room on September 10, 1989 in an unconscious state, with a medical history that included progressive dementia, a prior myocardial infraction, paroxysmal atrial fibrillation, high blood pressure, sarcoid osteoarthritis, and latent diabetes. She presented with subdural hematomas for which an emergency craniotomy was performed. She remained at Crouse in a vegetative state until her death almost two years later. During that time, she had a tracheostomy because of prolonged intubation and had a feeding tube in her stomach.

In August of 1991 when Mrs. Guthmann spiked a fever, her treating physician called in an infectious disease specialist and a cardiologist to assist in diagnosis and the determination of an appropriate course of treatment. Chest x-rays showed no sign of pneumonia, and a ventilation perfusion showed a high probability of pulmonary embolism, for which she was treated. Until her death, Mrs.

Guthmann was given oxygen by face mask, received respiratory therapy at least four times a day, was monitored continuously by the hospital staff and was given the medication and treatment ordered by her physicians.

Mrs. Guthmann's condition continued to deteriorate. Her treating physician determined that intubation would be futile, and that there was little hope of recovery or significant improvement. The specialists who had been called in concurred. Ultimately, Mrs. Guthmann was found not breathing and with no pulse. A code was called. Cardiovascular resuscitation compression and masked breathing were initiated, and Atropine and Epinephrine were administered, all to no avail.

B. Petitioner's Federal Claims

The federal statutory provisions cited in the petition, the Emergency Medical Treatment and Active Labor Act,

42 U.S.C. §1395dd ("EMTALA"), the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*, were raised by the petitioner for the first time on his appeal to the Appellate Division. Under New York law, arguments generally must be raised in the lower court in order to properly be before the Appellate Division for review. *Utica Board of Water Supply v. New York State Health Department*, 96 A.D.2d 719 (4th Dep't 1983).

The Appellate Division did not render a written opinion in affirming the dismissal of the petitioner's complaint and denial of his motion to renew. There is no basis for concluding that the Court did not follow its own precedent in deciding the appeal, or that it even considered the petitioner's federal statutory arguments raised for the first time on the appeal.

THE WRIT SHOULD BE DENIED

A. The Supreme Court has no Jurisdiction

Petitioner seeks to invoke this Court's jurisdiction

under 28 U.S.C. §1257. Under that jurisdictional provision, final judgments of the highest state court in which a decision could be had may be reviewed only where:

> ...the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This Court has no jurisdiction to review state court determinations of purely state law. *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). Moreover, the exercise of jurisdiction by this Court is precluded where there are independent and

adequate state law grounds for the state court decision. *id.*

Under New York law, in order to defeat the respondents' summary judgment motions petitioner was required to produce an expert affidavit providing evidentiary support for his claims of medical malpractice and abandonment once the respondents had satisfied the burden of making a prima facie showing of entitlement to judgment . *Fiore v. Galang*, 64 N.Y.2d 999 (1985). He failed to do so, and the Court below properly granted the respondents' motions by the application of New York State law.

With regard to the petitioner's motion to renew, the lower court properly exercised the discretion given it under state law to deny the motion for failure to make a showing that that new facts presented were unknown and not discoverable at the time of the original motion. *Gifaldi v. Dumont Co., Inc.*, 172 A.D.2d 1025 (4th Dep't 1991).

While this Court would not be bound by a state court determination that the federal statutory claims were raised properly by the petitioner in the state court proceedings,

there is no basis in this case for concluding that they were, when the petitioner himself concedes that the claims were not asserted until his appeal to the Appellate Division. (Petition, p. 1). Moreover, there is no reason to believe that federal law played any part whatsoever in the Court of Appeals decision to deny the motion for leave to appeal (the only order with respect to which the writ is sought).

B. There is No Reason to Grant the Writ

This case is not one in which a state court of last resort has decided an important federal question in a manner that conflicts with the decision of another state's court of last resort or a United States Court of Appeals. This is not a case in which the state court has decided an important question of federal law that has not been, but should be settled by this Court, or conflicts with any relevant decision of this Court. This is a simple state law medical malpractice case.

The Appellate Division correctly applied state law in affirming the dismissal of the petitioner's medical malpractice action and the denial of his motion to renew. Moreover, if the state court had considered the petitioner's untimely federal law claims, the court would have had to conclude that they had no merit.

The EMTALA applies only when a patient coming into an emergency room does not receive proper medical screening or is not stabilized before being transferred or discharged. *Matter of Baby K*, 16 F.3d 590 (4th Cir.), *cert. denied* 115 S.Ct. 91 (1994). Mrs. Guthmann had been a patient at Crouse for close to two years at the time of the alleged malpractice and abandonment.

The purpose of the Rehabilitation Act is to prohibit discrimination on the basis of handicap by programs receiving federal aid. *Stephanidis v. Yale University*, 652 F.Supp. 110 (D.Conn. 1986), *aff'd* 814 F.2d 654 (2d Cir. 1986). There was no evidence of discrimination on the basis of a handicapping condition before the state court.

The ADA expands the Rehabilitation Act to cover discrimination by entities that do not receive federal funding. *McDonald v. Com. of Pa. Dept. of Public Welfare*, 62 F.3d 92 (3d Cir. 1995). It prohibits discrimination on account of disability in employment, provision of public services, and in public accommodations. There was no evidence before the state court showing discrimination of any kind in the care and treatment of Mrs. Guthmann.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

DATED: August 26, 1997

Respectfully submitted,

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(3)

No. 97-313

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In The

Supreme Court of the United States

October Term, 1997

MRS. IDA GUTHMANN, deceased, STEPHEN F. GUTHMANN, ESQ., personally and as administrator as of 24 September 1992,

Petitioners,

against

CROUSE IRVING MEMORIAL HOSPITAL, ESTER MURROCK-NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P.A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA, DR. GEORGE E. MITCHELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSTION

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STATEMENT OF THE CASE

The New York Court of Appeals dismissed petitioner's motion seeking leave to appeal to that court from an order of the New York State Supreme Court, Appellate Division, Fourth Department affirming a New York State Supreme Court order denying his motion to renew summary judgment motions made by the respondents that had been granted, culminating in the dismissal of petitioner's complaint in this action alleging medical malpractice and wrongful death. The Court of Appeals has also denied petitioner's motion seeking leave to appeal from the Appellate Division's affirmance of the dismissal of the complaint.

Ida Guthmann, an 81 year old woman, was brought to the Crouse Irving Memorial Hospital ("Crouse") emergency room on September 10, 1989 in an unconscious state, with a medical history that included progressive dementia, a prior

myocardial infarction, paroxysmal atrial fibrillation, high blood pressure, sarcoid osteoarthritis, and latent diabetes. She presented with subdural hematomas which necessitated an emergency craniotomy. She remained hospitalized at Crouse in a chronic vegetative state until her death almost two years later. During that time, she had a tracheostomy because of prolonged intubation and had a feeding tube placed in her stomach.

Petitioner raised several federal statutory claims for the first time in his appeal to the Appellate Division: the Emergency Medical Treatment and Active Labor Act, 42 USC §1395dd ("EMTA-LA"); the Rehabilitation Act of 1973 29 USC §794; and the Americans with Disabilities Act, 42 USC §12101. Under New York law, arguments must be raised in the lower court in order to be considered by the Appellate Division for review. Utica Board of Water Supply v. New York State Health Department, 96 AD2d 719 (4th Dept. 1983). Petitioner has therefore failed to preserve his federal claims

for appellate review and they should not now be considered.

The Appellate Division did not render a written opinion in affirming the dismissal of the petitioner's complaint and denial of his motion to renew. There is no basis for concluding that the court did not follow its own precedent in deciding the appeal, or that it even considered the petitioner's federal statutory arguments raised for the first time on the appeal.

THE PETITION SEEKING A WRIT OF CERTIORARI SHOULD BE DENIED

Petitioner relies upon 28 USC §1257 in his effort to invoke this court's jurisdiction. The statute provides that final judgments of the highest court in which a decision could be had may be reviewed only when:

> the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the

> United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This court has no jurisdiction to review state court determinations of purely state law. International Longshoremen's Association, AFL-CIO v. Davis, 476 US 380, 387 (1986). This court also has no jurisdiction to review state court determinations that are supported by independent and adequate state law grounds. Id.

Under New York law, in order to defeat the respondents' summary judgment motions petitioner was required to produce proof in evidentiary form to support his claims of medical malpractice and wrongful death and negligence and abandonment, once the respondents had satisfied their burden of making a prima facie showing of entitlement to judgment as a matter of law. Fiore v. Galang, 64 NY2d 999 (1985). He failed to do so, and the court below properly granted the

respondents' motions by the application of New York State law.

With regard to the petitioner's motion to renew, the lower court properly exercised the discretion conferred by state law to deny the motion for failure to make a showing that new facts presented were unknown and not discoverable at the time of the original motion. Gifaldi v. Dumont Co., Inc. 172 AD2d 1025 (4th Dept. 1991).

While this court would not be bound by a state court determination that the federal statutory claims were raised properly by the petitioner in the state court proceedings, there is no basis in this case for concluding that they were, when the petitioner himself concedes that the claims were not asserted until his appeal to the Appellate Division. (Petition, p. 1). Furthermore, there is no reason to believe that federal law played any part whatsoever in the Court of Appeals decision to deny the motion for leave to appeal (the only

order with respect to which the writ is sought).

This case is not one in which a state court of last resort has decided an important federal question in a manner that conflicts with the decision of another state's court of last resort or a United States Court of Appeals. Nor is this a case in which the state court has decided an important question of federal law that has not been, but should be settled by this Court, or conflicts with any relevant decision of this Court. This is a straightforward case sounding in medical malpractice and wrongful death; one that should be adjudicated by the application of state law.

The Appellate Division correctly applied state law in affirming the dismissal of the petitioner's medical malpractice action and the denial of his motion to renew. Moreover, if the state court had considered the petitioner's untimely federal law claims, the court would have had to conclude that they had no merit.

The EMTALA applies only when a patient presenting to an emergency room does not receive proper medical screening or is not stabilized before being transferred or discharged. Matter of Baby K, 16 F3d 590 (4th Cir.), cert. denied 115 Sct 91 (1994). Mrs. Guthmann had been a patient at Crouse Irving Memorial Hospital for nearly two years at the time of alleged malpractice and abandonment, precluding application of the EMTALA statute.

The purpose of the Rehabilitation Act is to prohibit discrimination on the basis of handicap by programs receiving federal aid. Stephanidis v. Yale University, 652 F. Supp. 110 (D. Conn. 1986) aff'd, 814 F. 2d 654 (2d Cir. 1986). There was no evidence of discrimination against the plaintiff's decedent on the basis of a handicap before the state court. Nor was the state court presented with evidence that the defendant hospital received federal funds. The Rehabilitation Act was not properly raised in the court below and there is no basis for its application to the facts of this case.

Finally, the Americans with Disabilities Act expands the Rehabilitation Act to apply to acts of discrimination by entities that do not receive federal funding. McDonald v. Com. of Pa. Dept. Of Public Welfare, 62 F. 3d 92 (3d Cir 1995). The act applies to discrimination on the basis of employment disability, the provision of public services, and in the public accommodation. The ADA was not properly raised below, and there is no basis to support the application of this statute to the facts of this case.

CONCLUSION

For the foregoing reasons, an Order is respectfully requested that will deny Petitioner's application for a writ of certiorari.

DATED: September 15, 1997

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No. 97-313 (4)

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IN THE

Supreme Court of the United States

October Term, 1997

MRS. IDA GUTHMANN, deceased, STEPHEN F. GUTHMANN, ESQ., personally and as administrator as of 24 September 1992,

Petitioners,

against

CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK-NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P.A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA, DR. GEORGE E. MITCHELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there exist independent and adequate state grounds under New York State law to support the trial court's dismissal of the plaintiff's medical malpractice action based on a lack of prima facie evidence?

2. Whether the plaintiff should now be permitted, for the first time on appeal, to raise new issues involving federal statutes that: were not alleged in the plaintiff's pleadings; were not considered by the trial court; and were not the basis for the New York courts' prior appellate rulings in this action?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF FACTS

At issue in this litigation is the medical care and treatment rendered to eighty one year old Ida Guthmann from August 21, 1991 to her death on September 4, 1991.[1]

Appellant Stephen F. Guthmann's mother, Ida Guthmann, suffered a left front temporal subdural hematoma with significant mass effect sometime prior to her presentation at the Crouse Irving Memorial Emergency Room on September 10, 1989. She arrived unconscious with a prior medical history significant for progressive dementia, prior myocardial infarction, paroxysmal atrial fibrillation, high blood pressure, sarcoid, osteoarthritis, and latent diabetes. A CT scan of the patient's brain revealed a large chronic as well as acute left subdural hematoma with significant displacement of both ventricles across the mid-line and early transtentorial herniation. Dr. Modesti, a neurosurgeon, evaluated the patient and performed an emergency craniotomy to evacuate the hematoma.

Despite the successful evacation of the subdural hematoma, the patient remained comatose in a chronic vegetative state up to the time of her death on September 4, 1991. Throughout her extended course of treatment at Crouse Irving Memorial Hospital, Mrs. Guthmann was provided nourishment through a feeding tube. She had a tracheostomy because of prolonged intubation. She had an indwelling catheter for bladder control and enemas for bowel evacuation.

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[1] Plaintiff voluntarily notified the lower court and the parties that he was limiting his allegations to the time period of August 27, 1991, through September 4, 1991, and that he was withdrawing any claims outside that time period.

In August of 1991, Mrs. Guthmann developed a fever, which was initially diagnosed as a consequence of a urinary tract infection. Her fever improved for several days while she was treated with Flucanazole. Thereafter, her fever returned.

A chest x-ray on August 20, 1991 was interpreted as negative for signs of pneumonia. On August 27, 1991, Dr. Modesti requested an evaluation and consultation by Dr. Turchik, an infectious disease specialist. A ventilation perfusion scan on August 27, 1996, showed a high probability of pulmonary emboli. On the same date, Dr. Modesti requested an evaluation and consultation with Dr. Battaglia, a cardiologist, who recommended anticoagulant therapy for pulmonary emboli. An additional chest x-ray on August 27, 1991, was interpreted as negative for signs of pneumonia. The patient's condition improved on anticoagulant therapy with better breath sounds, better oxygen saturation, and she defervesced.

On September 1, 1991, she again spiked a fever. Additional chest x-rays on September 1 and September 3, 1991 were interpreted as negative for signs of pneumonia. Despite continued respiratory care and administration of oxygen by face mask, Mrs. Guthmann's condition continued to deteriorate.

On September 3, 1991, Dr. Modesti had a long discussion with Stephen Guthmann about his mother's condition and the poor prognosis for any type of recovery. Dr. Modesti advised Mr. Guthmann that, in his professional medical opinion, heroic resuscitative measures like intubation would be medically futile. Dr. Turchik and Dr. Battaglia agreed with Dr. Modesti's evaluation and recommendation.

Mr. Guthmann disagreed with Dr. Modesti's analysis and recommendation and insisted that all heroic measures be taken

to keep his mother alive. On September 3, 1991, Dr. Modesti advised Mr. Guthmann of his desire to withdraw from the case and that he would request that an alternate physician assume the care of Mrs. Guthmann. Dr. Modesti notified the hospital administration that he wished to withdraw from the case.

Unfortunately, in the early morning hours of September 4, 1991, Mrs. Guthmann was found unresponsive with no spontaneous respirations. An emergency cardiac code was called with the administration of cardiopulmonary resuscitation, atropine, epinephrine, electric defibrillation of the heart and oxygen by mask. Despite the efforts of the cardiac code team, Mrs. Guthmann expired at 6:20 a.m. Dr. Modesti was notified of Mrs. Guthmann's death and responded to the hospital.

PROCEDURAL HISTORY

The Plaintiff commenced this action by the service of a summons and complaint dated August 10, 1992. The plaintiff's complaint contains allegations of medical malpractice, homicide, abandonment, conspiracy to commit homicide, falsification of medical records, conspiracy to falsify records, fraud, and breach of implied contract against the medical personnel named in the complaint.[2]

Defendants Dr. Luciano M. Modesti and the Neurological Surgery Group of Physicians interposed an answer denying the plaintiff's allegations. Dr. Modesti is the neurosurgeon that initially performed an emergency craniotomy and evacuation of a subdural hematoma on Mrs. Guthmann upon her initial

---

[2] Plaintiff has voluntarily limited the issues in this matter to the alleged medical malpractice and alleged abandonment during the time period of August 21, 1991 thorough September 4, 1991.

presentation in 1989 (R 179). Thereafter, he was designated Mrs. Guthmann's attending physician. The only claim against Neurological Surgery Group of Physicians is that they are vicariously liable for the alleged acts and/or omissions of Dr. Modesti.

In June of 1995, almost three years after the commencement of the action, Dr. Turchik, Dr. Battaglia, and Dr. Mitchell moved for summary judgment. In support of their motions, the moving defendants submitted affidavits from three board certified medical experts from each of their respective fields. Dr. Mitchell Brodey, a specialist in infectious diseases, stated in his affidavit that the care and treatment of Mrs. Guthmann by Dr. Turchik was entirely consistent with accepted medical practice. Dr. James Potts, a specialist in cardiology, stated in his affidavit "that the care and treatment by Dr. Joseph Battaglia, and for that matter the other physicians, was entirely consistent with good and accepted medical practice." Dr. Alan Foster, a specialist in diagnostic radiology, stated in his affidavit that the care and treatment rendered by Dr. George Mitchell was consistent with accepted standards of medical care.

After a number of adjournments of the motion at the plaintiff's request, on September 5, 1995, Mr. Guthmann cross-moved for partial summary judgment against all defendants on the abandonment cause of action. Plaintiff did not submit any expert affidavits in support of his motion. Instead, he attempted to rely on three unsigned and unsworn reports from some unidentified physicians, along with deposition testimony from the medical examiner, an affidavit from a lay witness, and his own affidavit.

On September 21, 1995, defendants Crouse Irving Memorial Hospital, Esther Murrock, Dr. Scott Gingold, and Dr. P.A.

Gelnar (hereinafter Hospital defendants) moved for summary judgment. The Hospital defendants submitted expert affidavits from an emergency room physician and a nurse practitioner in support of their motion.

On September 27, 1995, defendants Dr. Luciano M. Modesti and Neurological Surgery Group of Physicians moved for summary judgment. In support of their motion, Dr. Modesti and N.S.G.P. submitted the affidavit of David G. Storrs, M.D., a neurosurgeon. Based on his review of the records and pleadings, Dr. Storrs stated in his affidavit that Dr. Modesti properly deferred to consultants in the field of infectious diseases, cardiology, and radiology for diagnosis and treatment and properly instituted those recommendations. Additionally, Dr. Storrs stated that, based on his review of the medical records, Dr. Modesti never abandoned or in any way refused to treat Mrs. Guthmann. In his expert opinion, Dr. Modesti's care and treatment of Mrs. Guthmann constituted good and accepted medical practice.

On October 27, 1995, the Court heard oral argument on the motions. Following oral argument, the Honorable Leo F. Hayes, J.S.C. granted the defendants' motions. The plaintiff's cross-motion was denied. An order was entered on November 16, 1995, along with a judgment.

Subsequent to the motion, the plaintiff requested an additional time period to attempt to obtain expert affidavits. Justice Hayes denied the plaintiff's informal request for additional time to submit expert affidavits, but advised the plaintiff "[i]f you wish to make a formal motion requesting additional time for this (sic) submission of experts' affidavits for consideration by the court, that is, of course, your prerogative to do so."

On December 11, 1995, the plaintiff filed a Notice of Appeal from the November 16, 1995 Order and Judgment.

On December 28, 1995, plaintiff moved the trial court for renewal and attempted to submit to the Court an affidavit of a physician signed after the original motion based on an argument that the affidavit constituted "newly discovered evidence." The defendants opposed the motion on procedural and substantive grounds.

On March 15, 1996, the Court heard oral argument and, then, denied the plaintiff's motion to renew. Thereafter, on April 4, 1996, the Court signed the order denying the plaintiff's motion to renew in its entirety. Defendants served and filed judgments on April 11, April 25, and May 3, 1996.

Plaintiff filed an appeal from the April 4, 1996 Order and each of the three judgments. On appeal, the plaintiff attempted, for the first time, to allege that several federal statutes applied to this action, including the Emergency Medical Treatment and Active Labor Act, 42 U.S. C. §1395dd, the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act, 42 U.S.C. §12101. On December 30, 1996, the Appellate Division of the Fourth Department affirmed the dismissal of the plaintiff's complaint.

The plaintiff petitioned the Appellate Division of the Fourth Department for leave to appeal to the New York Court of Appeals and, in the alternative, for reargument. On March 14, 1997, the Appellate Division of the Fourth Department denied the plaintiff's motion.

On April 1, 1997, the plaintiff filed a petition for certiorari to the New York Court of Appeals. On June 17, 1997, the New York Court of Appeals denied the plaintiff's petition.

Now, the plaintiff petitions the Supreme Court of the United States for a writ of certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. Petitioners Federal Claims were First Raised on Appeal.

The plaintiff's original pleadings do not include any reference to the federal statutes cited by the plaintiff. At no time did the plaintiff seek leave to amend his pleadings to include the federal claims. The plaintiff raised the federal claims for the first time on appeal. Under New York law, an appellant is precluded from raising on appeal an issue that was not raised before the lower court. *Telaro v. Telaro*, 25 N.Y.2d 433, 438 (1969); *Angel Fabrics, Ltd. v. Cravat Pierre, Ltd*, 51 A.D.2d 951 (1st Dept. 1976); *Berger v. Fete Cab Corp.*, 57 A.D.2d 784 (1st Dept. 1977); and *Holmes v. Utica Mutual Insurance Co.*, 92 A.D.2d 1045 (3d Dept. 1983). Thus, the plaintiff is precluded from raising the federal claims for the first time on appeal.

2. There are Independent and Adequate Grounds Under New York State Law to Support the Trial Court's Dismissal of the Plaintiff's Medical Malpractice Action Based on a Lack of Prima Facie Evidence.

As discussed above, New York law precluded the plaintiff from raising the federal claims for the first time on appeal. The appellate decisions affirming the dismissal of the plaintiff's

complaint were based solely on New York law: the failure to produce expert evidence in admissible form to establish a prima facie case of medical malpractice. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 327 (1986). There is no evidence or any indication that the appellate decisions were based in any part on any of the federal statutes cited by the plaintiff. The decisions do not discuss the federal statutes. The decisions do not cite to the federal statutes or federal case law. To the contrary, under established New York case law, the plaintiff was precluded from raising new issues on appeal and, therefore, the previous appellate decisions must be presumed to be based on the findings of the lower court, which were based solely on New York law.

It is well established that where there is an independent and adequate basis for the state court's decision below, the Supreme Court will not disturb the state court decision below. *Illinois v. Rodriguez,* 110 S.Ct. 2793 (1990). In this action, there are independent and adequate grounds to support the New York trial court's dismissal of the plaintiff's medical malpractice action because the plaintiff failed to establish a prima facie case under New York law. Thus, the trial court's decision should not be disturbed.

3. The Supreme Court Lacks Jurisdiction to Review this Matter.

The plaintiff's only basis for jurisdiction is 28 U.S.C. §1257. As discussed above, the dismissal of the plaintiff's complaint was based solely on New York law. Under 28 U.S.C. §1257, there is no basis for review of determinations based purely on state law. *International Longshoreman's Association, AFL-CIO v. Davis,* 106 S.Ct. 1904 (1986). Similarly, under 28 U.S.C.

§1257, there is no basis for review of this matter because the federal statutes were not considered by the appellate courts.

Nor is there any potential conflict between the ruling of the New York courts in this action and prior or future interpretations of the federal statutes involved by other courts. The plaintiff's complaint was dismissed, pursuant to New York law, because the plaintiff failed to establish a *prima facie* case of medical malpractice. The decision in this action is based on independent and adequate state grounds that do not implicate the application or interpretation of the federal statutes involved. Thus, the Supreme Court lacks jurisdiction to review this matter.

4. The Plaintiff's Federal Law Claims Lack Merit.

There is no merit to the plaintiff's federal claims based on the Emergency Medical Treatment and Labor Act, 42 U.S.C. §1395dd; the Rehabilitation Act of 1973, 29 U.S.C. §794; or the Americans with Disabilities Acts, 42 U.S.C. §12101.

The EMTALA is designed to prevent hospitals participating in the Medicare program from refusing to treat a patient with an emergency medical condition or from transferring the patient before the patient is stabilized based on the patient's lack of insurance coverage or the patient's inability to pay for medical expenses. *Correa v. Hospital San Francisco,* 69 F.3d 1184, 1189 (1st Cir. 1995), cert denied 116 S.Ct. 1423 (1996). In the instant action, the plaintiff's decedent received emergency medical treatment on September 10, 1989. Thereafter, she was admitted and remained a patient for almost two years. The EMTALA does not apply because this action does not involve emergency medical treatment.

Moreover, even if EMTALA were to apply, the plaintiff voluntarily withdrew any claims other than for the medical care in the time period from August 27, 1991 to September 4, 1991. Thus, the emergency medical treatment on September 10, 1989 is no longer at issue. The EMTALA simply does not apply in this action.

The Rehabilitation Act of 1973 expressly states that a handicapped individual shall not be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal assistance . . ." 29 U.S.C. §794. In the instant action, the plaintiff failed to prove any discrimination against the plaintiff's decedent. Thus, the Rehabilitation Act of 1973 does not apply.

The purpose of the Americans with Disabilities Act is to prevent discrimination against individuals with disabilities. 42 U.S.C. §12101(b). In the instant action, the plaintiff failed to prove any discrimination against the plaintiff's decedent. Thus, the ADA does not apply.

In sum, even if the federal claims were considered, the plaintiff's allegations lack merit.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the plaintiff's petition for a writ of certiorari should be denied.

Respectfully submitted,

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